



POLICE DEPARTMENT

July 30, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Coty Green
Tax Registry No. 949057
40 Precinct
Disciplinary Case No. 2013-9898

Police Officer Romaine Wilson
Tax Registry No. 949804
40 Precinct
Disciplinary Case No. 2013-9897

The above-named members of the Department appeared before the Court on April 11, 2014, charged with the following:

Disciplinary Case No. 2013-9898

1. Said Police Officer Coty Green, on or about January 19, 2012, at approximately 2000 hours, while assigned to the 40th Precinct and on duty in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he stopped Eric Vigo, without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

Disciplinary Case No. 2013-9897

1. Said Police Officer Romaine Wilson, on or about January 19, 2012, at approximately 2000 hours, while assigned to the 40th Precinct and on duty in the vicinity [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he stopped Eric Vigo, without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

The Civilian Complaint Review Board (CCRB) was represented by Paul Scotti, Esq. Respondents were represented by Craig Hayes, Esq., Worth, Longworth & London LLP.

Respondents pleaded Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondents are found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The CCRB's Case

The CCRB called Eric Vigo as a witness.

Eric Vigo

Vigo was 21 years old and had lived in the Bronx all his life. On the evening of January 19, 2012, he was visiting his aunt and cousins at [REDACTED]

[REDACTED] This was on [REDACTED] Vigo's apartment. Vigo visited his family on a weekly basis.

Vigo testified that as he approached his aunt's building on that day he observed a person he recognized from the neighborhood leaving the building. Two police officers (Respondents) approached this person, but Vigo was unable to hear their conversation. Respondents then entered the building.

Vigo testified that there were two doors to pass through to enter the building (see CCRB Exhibit [CCRBX] 1, photograph of front of building showing outer and inner doors). Vigo stated that both doors were unlocked that day.

Vigo entered the building and observed Respondents standing in the lobby. Vigo walked to the elevator, not saying anything to Respondents as he walked by. Not long after Vigo pressed the elevator button, Respondents approached him and asked him where he was going. Vigo informed Respondents that he was visiting his aunt on the [REDACTED]. Respondents asked Vigo to take them upstairs, but he refused. Vigo explained at trial that he did not want to bring the police to his aunt's house.

At that point, Respondents moved Vigo away from the elevator door and placed him against a wall (see CCRBX 2, photograph showing wall in relation to elevator). Vigo stood with his back pressed against the wall and Respondents approximately a foot in front of him. Respondents told Vigo that he was going to get arrested for trespassing. Vigo responded by pulling out his identification and stating, "I guess I am going to have to get arrested." Vigo also pulled out his cell phone, called his mother, and told her to come to the location. As he was calling his mother, Respondents pulled his arm down and told him to put the phone away. He put the phone in his pocket and started to walk toward the door.

Respondents grabbed Vigo and arrested him for trespassing. The case later was dismissed.¹ Vigo filed a civil lawsuit in connection with this incident, which later was settled.

¹ According to Respondent Wilson, a relative of Vigo came to the precinct after his arrest and demonstrated that she lived in the building. Respondents' sergeant directed that the trespass arrest be voided but a charge of resisting arrest was presented to the District Attorney's Office. The CCRB attorney stated that the case was dismissed at arraignment. This could have been because a resisting arrest charge must be based on the defendant resisting an arrest that itself is based upon probable cause. See, e.g., People v. Jensen, 86 N.Y.2d 248, 253 (1995).

Vigo admitted that he had pleaded guilty to trespass on two occasions, January 23, 2010, and October 26, 2010. Neither of those incidents occurred inside [REDACTED] On January 17, 2013, and January 31, 2013, Vigo pleaded guilty to unlawful possession of marijuana.

On cross examination, Vigo testified that it took less than five minutes to walk from his apartment to his aunt's building. He walked at a normal pace. He told CCRB investigators in a March 2012 interview that Respondents followed him into the building. He characterized this as a "mistake" because in actuality Respondents already were in the building when he entered. He also made a "mistake" when he stated the same month at a General Municipal Law § 50-h hearing that he already was standing at the elevator when Respondents entered the building. He did not recall telling CCRB investigators, "When I walked in, I was waiting for the elevator and another kid came in."

Vigo did not know that his aunt's building was designated as a Clean Halls building. He never had seen signs there indicating that he could be arrested if he neither lived there or was visiting. Vigo explained that his previous arrests for trespass took place when he was visiting New York City Housing Authority buildings. He understood that "in Housing Authority buildings and other buildings in this city," the police could ask people if they lived there because of crime conditions. Vigo was, nevertheless, surprised when Respondents asked him if he lived in the building. He never had seen police officers in his aunt's building before.

Vigo testified that the elevator door opened while Respondents approached him. He complied with Respondents' instruction to step aside. He did not attempt to step inside the elevator. He acknowledged that in neither his CCRB interview nor the § 50-h hearing did he mention the elevator door opening or Respondents ordering him to step aside. He told CCRB

investigators, "So they asked both of us what were we doing in there. I said I'm going to my aunt's house. The kid didn't say nothing, he just walked out and they stood there with me. So I asked the officer, all right, why are you all standing here with me, because the kid walked out. And the officer said, I don't like you, and the other officer said, yeah, I don't like this kid either. So they started getting close to me . . . and I can see where this is going."

After Respondents ordered him to step aside, Vigo was "talking a little." He did not remember exactly what he was saying, but he admitted that he was saying things to make Respondents mad. Respondents told him that they did not like his attitude. Vigo admitted that he was upset and angry about being stopped by the police, and he did have an attitude when talking with Respondents. He, nevertheless, described himself as being cooperative.

Vigo stated that he did not bring Respondents to his aunt's apartment because they did not have the right to know who was and was not supposed to be in the building. He acknowledged that Respondents would have been able to ascertain that he was not a trespasser.

Respondents did not make physical contact with Vigo until after he took his phone out. A struggle ensued. Vigo's mother arrived at the scene as Respondents were handcuffing him. Vigo's cousin also appeared at one point during the incident.

Upon questioning by the Court, Vigo testified that there were six floors in the building with eight apartments on each floor.

Respondents' Case

Respondents both testified on their own behalf.

Respondent Wilson

Respondent Wilson, a four-year member of the Department, was assigned to the 40 Precinct. He currently was assigned to the anticrime team and had made approximately 93 arrests during the course of his career. On January 19, 2012, he worked a foot post while assigned to the Impact unit with Respondent Green (who also currently was assigned to anticrime). Respondent Wilson described the area as busy with many robberies and grand larcenies, as well as a few gang crews.

The building in question was a Clean Halls building. Respondent Wilson understood this to mean that it was a privately-owned building in which the owner signed an affidavit allowing the police to enter the building at any time to conduct "routine patrol." There were signs in the building indicating the "clean halls procedure and the trespass laws." There had been narcotics complaints in that building. Respondent Wilson also had "prior knowledge and [i]ntel" concerning the building.

Respondents had just completed a vertical patrol of the building and were standing in the lobby when they observed Vigo and two other individuals approach the building from the outside. The other two individuals turned around and walked away upon seeing Respondents. Vigo, however, entered through the front door without using a key or buzzer and proceeded to the elevator.

Respondents previously had seen Vigo around the area, in a different building. While Vigo was waiting for the elevator, Respondents approached him and asked "what he was doing

in the building,” if he lived in the building or had a legitimate reason for being there. Vigo did not reply.

Respondent Wilson explained the reasons for approaching Vigo. First, the building was a Clean Halls building. Second, they assessed their prior knowledge about the building.

Respondent Wilson asked Vigo a second time if he lived in the building, and Vigo again did not respond. Vigo took a deep breath and looked to the left and right. He seemed upset. Respondents advised Vigo that it was important for him to tell them if he lived in the building or knew somebody that lived there. All Vigo said was, “You will just have to arrest me then.” Vigo made this statement loudly while kind of throwing his hands up, and Respondent Wilson believed that he was preparing to become combative.

Respondents advised Vigo that he was going to be arrested for criminal trespass, and they attempted to place handcuffs on him. Vigo did not comply immediately by putting his hands behind his back. The lobby floor was extremely slippery, but Respondents eventually were able to place Vigo in handcuffs.

Respondent Wilson testified that at no point while Vigo was standing by the elevator did he observe the elevator door open. Respondent Wilson never told Vigo to move aside, nor did he recall seeing Vigo take out a phone. Vigo did not attempt to walk out of the building while Respondents were questioning him. Respondents made no physical contact with Vigo prior to arresting him.

On cross examination, Respondent Wilson testified that the incident occurred at 1930 or 2000 hours, but the building lobby was well lit. Vigo, who would have been able to see Respondents standing in the lobby, entered the building without hesitation and proceeded

directly to the elevator. Respondent Wilson did not observe Vigo make any furtive movements or observe any bulges on his person.

Respondent Wilson admitted that he answered affirmatively at his June 2012 CCRB interview when asked, "So you knew the two guys [Vigo] was with, but not Mr. Vigo, right? You had no prior knowledge of this individual?" He stated at trial that he meant he did not know any of Vigo's pedigree information. He insisted that he had seen Vigo around the neighborhood.

Respondent Wilson agreed that Vigo was free to leave at any point prior to Respondents' approach, even after Respondents approached and asked him why he was in the building. Respondent Wilson did not recall if at some point Vigo moved to the side by the wall. He admitted stating at his CCRB interview that he thought Vigo had a cell phone in his hand.

On re-direct examination, Respondent Wilson testified that he associated Vigo with other locations in the neighborhood, and this was one of many factors he relied on prior to approaching Vigo.

Upon questioning by the Court, Respondent Wilson testified that there was a key for residents of the building to open the door, and a buzzer mechanism for visitors. Though the doors were unlocked when Respondents entered, Respondent Wilson testified that he would have inquired of anyone that walked into the building without a key or pressing a buzzer. He asserted that the two other individuals were known to the Department as being part of a local street gang.

Respondent Green

Respondent Green, a four-year member of the Department, had made approximately 70 arrests during the course of his career. He described the area of [REDACTED] as a high crime area with local street gangs, narcotics, robberies and grand larcenies.

Respondent Green testified that he observed three individuals walk toward the location. Two stayed outside but Vigo entered. Vigo walked to the elevator and pushed the button. Respondent Green asked Vigo if he lived in the building, but Vigo did not respond. Respondent Wilson repeated the question, and again Vigo did not respond. Respondents did not touch or threaten Vigo in any way; they just stood next to him and asked him questions.

Vigo's demeanor at first was calm, but he seemed to become agitated when Respondents started to ask questions. Vigo was taking deep breaths and rolling his eyes. When Respondents informed him that failure to answer their questions could result in arrest for trespassing, Vigo started flailing his hands like he was angry and stated, "Just arrest me." When Respondent Wilson grabbed his handcuffs, Vigo tried to push past Respondents and move toward the door. The floor was slippery, and they ended up on the ground. It took five to ten minutes to get Vigo in handcuffs.

At no point while Respondents were questioning Vigo did the elevator door open or did Vigo attempt to walk away. At no point during that period did Respondents restrict Vigo's movements, give him any commands, or touch him. Had Vigo answered Respondents' questions to their satisfaction, they would have let him go.

On cross examination, Respondent Green testified that he was not concerned that Vigo might have had a weapon. Vigo did not make any furtive movements, and there was nothing suspicious about his behavior as he entered the building and walked to the elevator.

FINDINGS AND ANALYSIS

Respondents are charged with stopping Eric Vigo without sufficient legal authority. The encounter took place in a privately-owned midrise apartment building that was part of the Clean

Halls program. This program allowed landlords to sign affidavits with the Department and the District Attorney's Office allowing officers to patrol the buildings and arrest trespassers. The idea was not simply to prevent trespassing, but to interdict more serious crimes that might be occurring along with the trespassing, like narcotics or gang activity.

Vigo testified that while he did not live at the building, he was visiting his aunt, who, it was undisputed, did live there. According to both Vigo and Respondents, Respondents were patrolling inside the lobby of the building when Vigo entered. Vigo asserted that he entered by himself to see Respondents questioning another man. They let that man proceed, Vigo said. Respondents countered that Vigo entered with two other men, behind him. Respondent Wilson said that these two others both were known gang members. The two turned around and left. Both sides agreed that while Vigo waited for the elevator, Respondents approached him and asked, in sum and substance, "Do you live here?" This was the "stop" in question, as defined at trial by counsel for the CCRB.

Both sides thus agreed that there was an encounter between Respondents and Vigo. The CCRB contended that the encounter was a stop and Vigo was not free to go. Thus, the stop required Respondents to possess reasonable suspicion, which they allegedly did not have.

Respondents argued that the encounter was not a "stop": it fell within a request for information under Step I of the street encounters analysis set forth in People v. De Bour, 40 N.Y.2d 210 (1976). At most, according to Respondents, the encounter was based on founded suspicion that criminality was afoot, allowing them the common-law right of inquiry under Step II of De Bour. This approach, however, elevates form over substance. It essentially goes against De Bour's approach of seeing police encounters in a fluid continuum that changes legal character

as the individuals involved act in different ways. The real question in this case is what level of suspicion Respondents needed to interact with Vigo in the way that they did.

Police officers in a Clean Halls building are allowed, by permission of the building owner, to enter the building, patrol the entrance, lobby, hallways and stairwells, and stop anyone encountered in these areas to ascertain whether the individual is a resident or otherwise present with permission. Cf. Case Nos. 81053 & 81055/05, p. 6 (Feb. 13, 2006). This is a permissible Level I request for information if it is based on an objective, credible reason, not necessarily indicative of criminality. See People v. Hendricks, 43 A.D.3d 361, 363 (1st Dept. 2007).

Respondents argued that the building was a magnet for narcotics sales and that several arrests had been made there. Cf. People v. Tinort, 272 A.D.2d 206 (1st Dept. 2000) (defendant was seen in drug-prone Clean Halls building where police had made several prior arrests, giving them objective, credible reason to stop). CCRB did not contest this assertion, which could have been proved one way or the other with objective statistics, so it would have been hard to falsify in any event.

Respondents also pointed out that the front door lock to the lobby apparently was broken. Respondents' counsel eventually clarified the testimony on this issue. Vigo's entrance through an unlocked door, without producing a key to test the door, itself was of no significance. Respondents themselves entered the same way, and a building resident likely would have known that the lock was broken and would not have produced a key anyway. The broken lock, however, was an invitation for trespassers to enter. In that light, the presence of people coming and going through the lobby without having to show a key made trespassing more likely. Cf. People v. Wannamaker, 93 A.D.3d 426 (1st Dept.) (door with broken lock was one factor giving

officers objective, credible reason to ask defendant if present legitimately), lv. denied, 20 N.Y.3d 989 (2012).

Vigo made prior inconsistent statements on who else was present when he entered. He stated in his CCRB interview that the officers followed him into the building. Vigo also stated there that the other man came into the building while Vigo was already at the elevator and that Respondents questioned both of them roughly at the same time. This lent support to Respondents' version of events, in which they became suspicious of Vigo when he entered with two known gang members who promptly left the building upon seeing the officers. Cf. People v. Abad, 279 A.D.2d 358 (1st Dept. 2001) (officers conducting vertical patrol in drug-prone building with no-trespassing signs had objective, credible reason to inquire into defendant's presence, especially because another individual who entered building at same time just had been found trespassing and arrested).

Respondent Wilson testified that he knew Vigo's face from somewhere, possibly just from around the neighborhood. Although he stated during his CCRB interview that he had "no prior knowledge" of Vigo, but "knew" the other two individuals, he credibly indicated at trial that he meant he did not know Vigo's name or information. He did not "recognize" him or "know who he was," but his face looked familiar. Cf. Wannamaker, 93 A.D.3d at 426 (although there could have been innocent explanation for defendant entering through door with broken lock, then leaving after two or three minutes, the officers thought he looked familiar, either from trespass program or wanted poster).

The very fact that the building was enrolled in a trespass affidavit program itself was a factor giving Respondents an objective, credible reason to stop Vigo. See People v. Barksdale, 110 A.D.3d 498, 498-99 (1st Dept. 2013) (not just reputation of area, but that landlord felt

building was so prone to trespass that police were necessary to remove intruders). Further, the question that Respondents asked Vigo was no different or more intrusive than one that a building employee could ask. Id. at 499.

There is nothing to support the CCRB's contention that Respondents' actions constituted a forcible stop because of where they were standing. There was no evidence that they stood in a way that prevented Vigo even implicitly from moving. Vigo conceded that Respondents moved him aside only after he refused to answer the question.

It is true that mere presence in a high-crime or drug-prone location is not an objective, credible reason to request information. See People v. Johnson, 109 A.D.3d 449, 450 (1st Dept. 2013). Here, however, the building owner asked for a police presence because of the concern about trespassers and associated crime. Respondents knew that several crimes had been reported at the building. Vigo entered the building with two other men, both known gang members, and both turned and left the building when they saw the officers. These factors, acting in combination, served to give Respondents an objective, credible reason to ask Vigo his reason for being inside the lobby. Respondents therefore are found Not Guilty.

Respectfully submitted,



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Assistant Deputy Commissioner - Trials

APPROVED

NOV 10 2014

WILLIAM J. BRATTON
POLICE COMMISSIONER